

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ALBERT DYTCH,  
Plaintiff,  
v.  
MAGANA, et. al.,  
Defendant.

Case No. [17-cv-00438-SI](#)

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. No. 64

Plaintiff Albert Dytch's motion for summary judgment is scheduled for a hearing on November 16, 2018. Pursuant to Civil Local Rule 7-1(b), the Court determines that this matter is suitable for resolution without oral argument, and VACATES the hearing.

Plaintiff moves for summary judgment under the Americans with Disabilities Act ("ADA," 42 U.S.C. § 1201, *et seq.*) and the California Unruh Civil Rights Act ("Unruh Act," Cal. Civ. Code § 51, *et seq.*). Plaintiff contends that defendant Maxaco, LLC, the landlord of Flaco's, a restaurant in Berkeley, has failed to remove specific barriers to plaintiff's full and equal access from its public accommodation. Plaintiff asserts that the evidence in the record shows: (1) he is disabled; (2) defendant's property—including the restroom and parking lot—is a restaurant and thus a place of public accommodation; (3) he visited the restaurant twice; (4) while at the restaurant he encountered accessibility barriers in the restroom and parking lot in violation of the ADA and Unruh Act; (5) the cost of remedying the violations is \$31,000; and (6) defendant can financially afford the cost of removing the barriers.

Defendant opposes summary judgment and contends it has submitted evidence raising material questions of fact on the ADA and Unruh Act claims. The defendant has raised issues of

1 material fact as to whether defendant can afford the cost of remediation, as to when the building  
2 was constructed, and the threshold matter of whether the restroom and parking lot are public  
3 accommodations within the meaning of the ADA. Although plaintiff raises some well-founded  
4 objections to defendant's declaration, most go to the weight, rather than the sufficiency, of the  
5 evidence challenged. Therefore, summary adjudication is not appropriate.

6 The Court notes, however, that if/when this matter goes to trial, both sides will be required  
7 to present evidence, not conjecture, and will be required to lay proper foundations for any  
8 evidence presented.  
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10 **IT IS SO ORDERED.**

11 Dated: November 14, 2018

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14 SUSAN ILLSTON  
15 United States District Judge  
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